

1 **MATTHEW RIGHETTI** (SBN #121012)
matt@righettilaw.com
2 **JOHN GLUGOSKI** (SBN #191551)
jglugoski@righettilaw.com
3 **MICHAEL RIGHETTI** (SBN #258541)
mike@righettilaw.com
4 **RIGHETTI LAW FIRM, P.C.**
5 456 Montgomery Street, Suite 1400
San Francisco, CA 94104
6 **Telephone: (415) 983-0900**
7 **Facsimile: (415) 397-9005**

8 Attorneys for Creditors Card,
Hernandez, Gentry and Skaf

9
10 **IN THE UNITED STATES BANKRUPTCY COURT**
11 **FOR THE EASTERN DISTRICT OF VIRGINIA**
12 **RICHMOND DIVISION**

13 In re:

14 Circuit City Stores, Inc., *et al.*,
15 Debtors.

Chapter 11

Case No. 08-35653 (KRH)
Jointly Administered

16 **DECLARATION OF MATTHEW**
17 **RIGHETTI IN SUPPORT OF**
18 **CREDITORS GENTRY,**
19 **HERNANDEZ, CARD, AND SKAF'S**
20 **OMNIBUS OPPOSITION TO**
21 **DEBTOR'S MOTIONS FOR**
22 **SUMMARY JUDGMENT AND**
23 **APPLICATION FOR A RULE 56(f)**
24 **CONTINUANCE**

Date: March 25, 2010
Time: 2:30 p.m. ET
Room: 5000
Hon. Kevin Huennekens

25 I, **MATTHEW RIGHETTI**, declare that:

- 26 1. I make this declaration of my personal knowledge and could testify thereto if
27
28

1 called as a witness. I am an attorney licensed to practice law in the State of California and I
2 represent the Plaintiffs/Creditors in the above captioned bankruptcy proceeding. I have been
3 admitted *pro hac vice* to practice in this Court (Docket No. 6781).

4 **EDUCATION AND EXPERIENCE**

5 2. I graduated from the University of California at Berkeley in 1982 with a degree in
6 Economics. I then graduated from the University of San Francisco School of Law in 1985. I am
7 admitted to practice law before the following courts: A) United States Courts of Appeal in the
8 Ninth Circuit and the Federal Circuit; B) United States District Courts in the Northern, Central,
9 Eastern, and Southern Districts of California, and the Northern District of Illinois, and C) all of
10 California's state courts.
11

12 3. I have been practicing law full time for the past twenty-five (25) years. My
13 practice has been devoted to complex class action litigation for the past twenty years. Much of
14 this litigation has involved class action prosecution of wage and hour laws (state and federal),
15 state and federal privacy laws (FCRA and CCCRA) and consumer laws. My practice involves
16 litigation in both state and federal courts. A sampling of some of the more significant class
17 action cases (including wage and hour litigation) handled by Righetti Law Firm, P.C., includes:
18 *Gentry v. Circuit City Stores, Inc.* (Hon Tricia Ann Bigelow, Los Angeles County Superior
19 Court), plaintiff's counsel in an overtime class action where the court of appeal's decision
20 affirming a trial court's order to enforce an employment agreement barring class actions was
21 reversed by the California Supreme Court in *Gentry v. Superior Court* (2007) 42 Cal.4th 443;
22 *Rocher v. Sav-On Drug Stores* (Hon. Victoria G. Chaney, Los Angeles County Superior Court),
23 co-lead counsel in a certified overtime class action [in a seminal decision, the California
24 Supreme Court unanimously overturned the Court of Appeal's decision to reverse certification
25
26
27
28

1 (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319)]]; *Cooper et al. v. Chief*
2 *Auto Parts* (Hon. Ken Kawaichi, Alameda County Superior Court), a multi-party (over 200
3 included plaintiffs) overtime case that proceeded through a merits arbitration; *Winfrey v. Chief*
4 *Auto Parts* (Hon. David Garcia, San Francisco Superior Court), a certified wage and hour class
5 action where the trial court's order to deny certification was reversed by the First DCA in an
6 unpublished opinion; *Rutti v. Lojack* (USDC, California) [Ninth Circuit reversed District Court
7 summary judgment order based on Petition for Rehearing (See, *Rutti v. Lojack* (2010) 07-56599
8 (9th Cir. 2010)).

9
10 There are many cases where Righetti Law Firm, P.C. has acted as class counsel in
11 certified class actions in state and federal courts and on appeal.

12 4. We acted as trial counsel in what we believe are the only three class action
13 overtime cases ever to have been tried under the quantitative executive exemption standard
14 articulated in *Ramirez v. Yosemite Water Company* (1999) 20 Cal.4th 785. The first case was
15 tried in Los Angeles County Superior Court before the Hon. J. Stephen Czuleger, resulting in a
16 phase one finding that U-Haul had misclassified all California salaried "General Managers" as
17 exempt from overtime. The case settled before the phase two remedy trial convened. The
18 second case was tried in San Diego County Superior Court before the Honorable Patricia
19 Cowett, resulting in a phase one finding that *Aiko Party City* had misclassified salaried
20 employees as exempt from overtime. In the third case, we were co-lead counsel in the *Sav-on*
21 overtime litigation that completed the first phase of trial before the Honorable Victoria G.
22 Chaney (now Justice Chaney) in Los Angeles County Superior Court (complex). Plaintiffs'
23 counsel also prepared for trial the *Staples Overtime Cases* for trial before the Hon. Ronald M.
24 Bauer, and the *Goodyear* overtime class action before the Hon. Anthony Mohr (the case settled a
25
26
27
28

1 few weeks before the class-wide trial).

2 5. I regularly speak on panels that involve class action and employment issues. On
3 average, I speak four or five times per year to organizations such as the American Conference
4 Institute, California Employment Lawyers Association, Bridgeport CEB, Industrial Relations
5 Association, and a wide range of Bar associations in California on class action issues involving
6 matters such as trial methodology, class certification, discovery and privacy issues, arbitration
7 agreements and releases, mediation and settlement and recent developments in the field. Over
8 the years litigating these kinds of cases we have developed a good deal of appellate experience.
9 It is quite common for our class action cases to traverse through the appellate courts during the
10 course of proceedings. We have also represented plaintiffs in many other appellate court
11 decisions in state and federal court. Righetti Law Firm also represents various amicus groups on
12 occasion in court of appeal proceedings. We have handled appeals throughout California and in
13 the federal courts of the Ninth Circuit, the Seventh Circuit and the Federal Circuit.
14
15

16 **PROCEEDINGS IN THE CASE AT BAR**

17 6. The earliest of the pending wage cases against Debtor started in August 29, 2002
18 (*Gentry*). The remaining three cases were filed and litigated thereafter. In each case – despite
19 the Supreme Court’s decision invalidating Debtor’s arbitration agreement – Debtor repeatedly
20 sought to enforce its arbitration agreement in the trial courts. Each trial court that heard the
21 issue agreed with Plaintiffs and refused to enforce Debtor’s arbitration agreement – and each
22 time Debtor pursued the issue further in the courts of appeal. Based on both Debtor’s filing of
23 its voluntary petition and Debtor’s appeals in state court, the trial and appellate court
24 proceedings have been stayed under both California Code of Civil Procedure section 916 and
25 pursuant to the federal bankruptcy law “automatic stay” rules.
26
27
28

1 7. Debtor has failed to respond to any of the allegations in any of the pending
2 claims/cases in either state court or this bankruptcy court. No answer or other response has been
3 filed (other than serial and perfunctory objections). No Rule 26 conference has been scheduled
4 or conducted. Even if Creditors knew what alleged claims Debtor was disputing, which we still
5 do not because no response to any of the complaints/claims has been made by Debtor, due to the
6 automatic stay, Creditors' counsel is prohibited from conducting discovery on any issues
7 (certification, merits or damages) against Debtor.
8

9 8. Creditors (Gentry, Card, Hernandez and Skaf) have been not-so-patiently waiting
10 in line for Debtor to "engage" on Creditors' claims. I repeatedly contacted Debtor's counsel at
11 Skadden Arps to discuss these claims. I asked several times whether Debtor would stipulate to
12 relief from the automatic stay so these claims could be litigated in state court (with the proviso
13 that the parties would then return to this Court so any resulting judgment could be handled by
14 this Court in the context of the bankruptcy proceedings). Debtor's bankruptcy counsel informed
15 me that a) it will not consider relief from the automatic stay to either litigate the claims in state
16 court or here, and b) due to the fact that this is a liquidating Chapter 11 case, this Court has
17 repeatedly advised Debtor and Creditors' counsel that it disfavored motions requesting relief
18 from stay to litigate in state court, as it is costly and will further depreciate debtor's already
19 depleted asset base through expenditure of funds on litigation matters. In other words, this
20 Court wanted all matters to stay in Virginia and remain subject to the automatic stay.
21
22

23 9. There has been no response to any of the claims/complaints at issue here. Nor
24 has any Rule 26 conference been scheduled. Likewise, there has been no Rule 26 disclosures
25 set. Based on the "stayed" status of the case, Creditors have not been given the opportunity to
26 conduct any discovery – nor could Creditors have known what discovery to conduct given that
27
28

1 Debtor has not answered any of Creditors' allegations. Until Debtor filed the four Motions for
2 Summary Judgment and Supplement to Omnibus Objections immediate at issue here, Creditors
3 had no information whatsoever as to which aspect of Creditors' claims, if any, Debtor disputed.
4 And, we still do not know as that cannot be discerned from Debtor's moving papers. For
5 example, Creditors still do not know whether Debtor disputes Creditors' claims for unpaid
6 wages, or damages, or class certification, etc. – and if so, on what basis (legal or factual). Until
7 Debtor provides Creditors with such information it is *impossible* to determine the scope of
8 discovery which would be necessary to evaluate Debtors contentions and/or affirmative defenses
9 – all essential building blocks to a motion for class certification. As a result, the Creditors are
10 without critical information (and have not even been given the opportunity to discover the
11 information) necessary to oppose or refute the arguments of Debtor in both its Motions for
12 Summary Judgment and Supplements to Objections Nineteen and Thirty-One.
13

14
15 10. As laid out in Sections IV(B)(1), (2), (3), (4) Creditors specifically need to
16 conduct the following discovery in order to support arguments to oppose Debtor's Motions for
17 Summary Judgment and/or Omnibus Objections:

18 **a. Creditors need discovery specifically related to class certification.**

19 In order to make a B.R. Rule 9014(c) motion to have a court apply B.R. Rule 7023 to a
20 case, one must establish that his/her case meets all the elements for Rule 23 class certification
21 (e.g. questions of law or fact common to the members of the class predominate over any
22 questions affecting only individual members, and that a class action is superior to other available
23 methods for the fair and efficient adjudication of the controversy). This showing is not possible
24 in even the most clear-cut case without first conducting discovery.
25

26 Creditors have been precluded from assembling any of the evidence necessary to support
27

1 a certification motion because they have been unable to conduct any discovery in any of the four
2 cases, much less explore any of Debtor's contentions or affirmative defenses because they have
3 not answered or disputed Creditors' Complaints/claims.

4 Prior to receiving Debtor's Motions for Summary Judgment Creditors weren't even
5 aware if Debtor was disputing class certification in these cases at all because Debtor has not
6 answered the complaints/claims. For these reasons, now that Debtor and the Court are both
7 focused on the issues in these cases, Creditors request the opportunity to conduct discovery in
8 order to make a showing to the Court that the cases are appropriate for certification.
9

10 **b. Creditors need discovery to determine which of the unnamed class**
11 **member claimants deserve priority.**

12 Creditors' second specific need for discovery pertains to Debtor's Motions for Summary
13 Judgment. Debtor's Motions for Summary Judgment each ask that Creditors' claims be
14 reclassified to unsecured, non-priority claims pursuant to Bankruptcy Code Section 507(a)(4),
15 because, so Debtor asserts, none of the named Creditors worked within 180 days of the Petition
16 Date. Creditors have not been given the opportunity to conduct discovery as to which putative
17 class members in the respective four cases "earned" wages during the 180 days before the
18 Petition Date. Debtor is in the exclusive possession of all the information necessary to evaluate
19 which employees in California worked for the Debtor during this time period.
20

21 **c. Creditors need discovery as to the means through which Debtor**
22 **notified the unnamed, putative class member-claimants, if at all,**
23 **about the bar date in this case.**

24 Creditors' third specific need for discovery pertains to Debtor's indication that it
25 published the Claims Bar Date Notice in the Wall Street Journal and The Richmond time-
26 Dispatch. See, e.g. Motion for Summary Judgment with respect to class claim filed by Joseph
27 Skaf, ¶ 7. It appears that Debtor failed to take steps to provide reasonable and practical notice to
28

1 any of the unnamed claimants about the Bar Date in this case; rather, Debtor suggests that
2 because it merely published something in two different relatively obtuse news publications, it
3 has carried its burden of informing the unnamed claimants about their potential right to file a
4 claim.

5 Where Debtor has the requisite information to provide *actual* notice to unnamed
6 claimants about the right to file a claim before the Bar Date, it is disingenuous for Debtor to now
7 suggest that all unnamed claimants should be barred because they did not file claims after the
8 publication in the Wall Street Journal and the Richmond Times-Dispatch; especially where are
9 the class members are residents of California and are mainly low wage workers who are highly
10 unlikely to read the pages of the Wall Street Journal! It is also important to note that Creditors
11 have been unable to notify the unnamed claimants about these cases because Creditors' do not
12 have the identities and last known contact information for these former employees of Debtor.
13 For this reason, Creditor requests the opportunity to both obtain names and contact information
14 for the class members and to conduct discovery as to Debtor's method, if any, for notifying
15 unnamed potential claimants about the Bar Date for these proceedings.

16
17
18 **d. Creditors need the identities and contact information for the putative**
19 **class members.**

20 As to the identities of the putative class members, the putative class members are usually
21 the most knowledgeable witnesses of key facts in this case relevant to the class certification
22 issues noted above. The information derived from the putative class members usually sheds the
23 most light on the issues of commonality and typicality, both essential elements under FRCP
24 Rule 23(b) (assuming Debtor is contesting those allegations). Accordingly, Creditors
25 respectfully request the opportunity to conduct discovery as to the identities and last known
26 contact information (residence address and phone number) for the unnamed claimants, as such
27

1 information is usually the most informative in proving up one's case for class certification.

2 11. For the reasons set out in Paragraph 9 above, Creditors specifically request the
3 Court's permission to conduct the following discovery listed below, which Creditors believe can
4 be accomplished in ninety (90) days if the Court lifts the mandatory stay on discovery currently
5 preventing Creditors from ascertaining any information regarding Debtor's contentions in these
6 cases. The discovery Creditors seek to conduct is as follows:

- 7
- 8 • Initial disclosures pursuant to Rule 26(a)(1);
 - 9 • A deposition of a corporate representative (person most knowledgeable) on a
10 limited number of topics related to class certification, wage/hour policies,
11 procedures and practices and Debtor's contentions regarding Creditors' claims,
12 and the means, if any, by which Debtor notified unnamed claimants of the bar
13 date in this case;
 - 14 • Limited production of documents pertinent to Creditors' claims, e.g.:
 - 15 ○ Employee personnel files for putative class representatives.
 - 16 ○ Documents reflecting employment policies and procedures, such as
17 employee handbooks, job or time/motion studies or surveys conducted of
18 putative class members and job descriptions.
 - 19 • Special Interrogatories seeking facts and witnesses supporting Debtor's
20 contentions in this case and requesting that Debtor identify the identities and
21 contact information for witnesses and putative class members.

22 Creditors believe that with the Court's permission to conduct the specific discovery listed above,
23 Creditors will have the information necessary to oppose Debtor's motions for summary
24 judgment and will be able to move forward in this Court with Creditors' motions for class
25 certification.

26 ///


27 ///

1 It is for these reasons that we respectfully request a ninety (90) day continuance and
2 permission from this Court to conduct discovery so we may submit our motion for class
3 certification.

4 I declare under penalty of perjury under the laws of the United States and the State of
5 California that the foregoing is true and correct. Executed this 17th day of March, 2010, at San
6 Francisco, California.
7

8 Respectfully Submitted,

9 **RIGHETTI LAW FIRM, P.C.**

10
11 
12 **MATTHEW RIGHETTI**
13 Attorneys for Creditors
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28